

## Agricultural Law Memo

**ALM 10-04**

Revised November 19, 2010

**TOPIC:** Small Plot Farming: Amendments to Chapter 40A, Section 3

**ISSUE:** General Laws Chapter 40A, Section 3 ("Section 3") contains a conditional exemption for agriculture from zoning by-laws or ordinances, at the same time giving cities and towns the conditional power, by express provision in their ordinances and by-laws, to limit this exemption to parcels of stated minimum size. The purpose of this ALM is to explain the parcel size limits that zoning by-laws and ordinances may impose.

Chapter 40A, Section 3, provides a conditional exemption from zoning on parcels of land whose primary purpose is commercial agriculture, whether relating to the use of land or the construction and use of agricultural structures. Section 3 provides that no zoning ordinance or by-law may prohibit, unreasonably regulate, or require a special permit for agricultural uses that satisfy the conditions established or authorized by that section. Those conditions are: (1) whether the primary use of the parcel is "commercial agriculture" within the very broad definition of agriculture laid down in G.L. c. 128, Section 1A; (2) whether the parcel is zoned for agriculture; (3) whether the parcel meets or exceeds the applicable minimum size limit imposed by the ordinance, by-law, or state law; and (4) whether the parcel generates annual revenues at or above \$1,000 per acre.

Prior to a recent amendment of Section 3<sup>1</sup>, the conditional exemption might have been re-stated as follows: *For parcels zoned for agriculture, the exemption shall apply regardless of parcel size. For parcels of any size not zoned for agriculture, the exemption shall still apply, but the city or town by express provision in its ordinance or by-law may limit the availability of the exemption to parcels of five or more acres.*

Blanket prohibitions often found in ordinances and by-laws that prohibit all uses except those expressly allowed do not satisfy the statutory requirement that area limitations on the agricultural exemption be explicit and specific, and thus do not serve to limit the area of parcels in agricultural use. Such blanket provisions, being unlimited as to area, can only be seen as tantamount to an outright prohibition, and thus inconsistent with Section 3. If the town seeks to limit the exemption based upon parcel size, it must expressly adopt such limit. That is, the ordinance or by-law must expressly state that, in areas not zoned for agriculture, agricultural uses shall be subject to the express limits imposed by the ordinance or by-law.

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<sup>1</sup> The amendment to Section 3 creating "small plot farming" was adopted under an outside section of the budget bill and became effective immediately upon the Governor's signing on August 5, 2010. It should also be noted that the amendment to Section 3 does not alter the acreage requirements of other laws, such as use taxation under Chapters 61, 61A and 61B.

Under the “small plot farming” amendment to Section 3, the power of cities and towns to set the minimum area of parcels whose primary use is commercial agriculture has been narrowed with respect to agricultural parcels of two acres or more if the sale of products from the agricultural use generates \$1,000 or more per acre of gross annual sales. For convenience, we shall call a parcel that generates at least \$1,000 or more per acre in gross annual revenue a “revenue-producing” parcel. This amendment requires that we revise our re-statement of the conditional exemption to the following: *For parcels zoned for agriculture, the exemption shall apply to parcels of any size. For parcels of any size not zoned for agriculture, the exemption shall still apply, but the city or town by express provision in its ordinance or by-law may limit the availability of the exemption to parcels of stated minimum size. That minimum may not exceed 5 acres generally; but such minimum shall not apply to parcels of 2 or more acres that are revenue producing.*

While under the small plot farming amendment of Section 3 area limits imposed in the ordinance or by-law may continue to apply to any parcel in agricultural use generally, by operation of state law they shall no longer apply to any parcel that is both revenue-producing and 2 or more acres in area.

It should be noted that an ordinance or by-law may be more generous to agriculture than what is stated in Section 3 by creating exemptions for parcels of less than 5 acres of non-revenue-producing land or parcels of less than 2 acres of revenue-producing land. A by-law might also establish lower revenue thresholds, such as a minimum parcel size of 2 acres or more that generates more than \$500 per acre; but for convenience, our analysis below will make reference to 5 acres and 2 acres and gross annual revenue of \$1,000 or more per acre.

Now let’s apply the re-stated general exemption with attention to the four factors identified in the first paragraph:

Let “A” mean “allowed,” let “P” mean “prohibited,” and let “SP” mean “special permit.” The 6 rows are hypothetical parcel sizes. The 4 columns illustrate how parcels of each of the 6 sizes may or may not qualify for the statutory exemption after the small plot farming amendment. It should be remembered that where no express area limitation is imposed in the zoning ordinance or by-law, commercial agriculture benefits from the exemption regardless of parcel size.

<b>Parcel Size (acres)</b>	<b>[A] Zoned for Agriculture</b>	<b>[B] By-Law prohibits all uses other than those expressly permitted</b>	<b>[C] Revenue-Producing</b>	<b>[D] Non-Revenue Producing</b>
<b>5+</b>	<b>A</b>	<b>A</b>	<b>A</b>	<b>A</b>
<b>5</b>	<b>A</b>	<b>A</b>	<b>A</b>	<b>A</b>
<b>4</b>	<b>A</b>	<b>A</b>	<b>A</b>	<b>P / SP</b>
<b>3</b>	<b>A</b>	<b>A</b>	<b>A</b>	<b>P / SP</b>
<b>2</b>	<b>A</b>	<b>A</b>	<b>A</b>	<b>P / SP</b>
<b>1</b>	<b>A</b>	<b>A</b>	<b>P / SP</b>	<b>P / SP</b>

The following are hypothetical illustrations of how the conditional exemption might apply.

Situation 1: The parcel is 1 acre of revenue-producing land but is located in an area in which agriculture is expressly allowed. The exemption applies because the parcel is “zoned for agriculture.” [Column A]

Situation 2: Consider two non-revenue-producing parcels, one 5 acres and the other 3 acres, and both are in areas not zoned for agriculture. Assume that the zoning by-law limits the area of parcels not zoned for agriculture to 5 acres or more. The five-acre parcel enjoys the exemption of Section 3 regardless of the level of revenue it produces. The three-acre parcel does not enjoy the exemption, and a by-law may prohibit or may require a special permit for agricultural uses. [Columns C and D]

Situation 3: Now take the three-acre parcel of land, and assume that it generates \$10,000 in annual revenues and is located in an area not zoned for agriculture. Again, assume the by-law limit the exemption of Section 3 to parcels of 5 acres or more in areas not zoned for agriculture (this may be the case with zoning by-laws adopted prior to the small plot farming amendment). In this case, while the parcel size is less than 5 acres, it is greater than 2 acres and, since its revenue amounts to \$3,333 per acre, it also meets the \$1,000 revenue-production requirement. Since, as explained above, Section 3 allows an exemption for parcels 2 acres or more that are revenue-producing, a five-acre zoning by-law limit would unlawfully restrict a revenue-producing parcel of 2 or more acres. The five-acre limit will not apply to this parcel. [Column C]

Situation 4: Next, consider a three-acre parcel of land that generates \$10,000 in annual revenues and is located in an area not zoned for agriculture. The by-law, however, provides the Section 3 exemptions for parcels of 2 acres or more that generate more than \$1,000 per acre. In this case, since the parcel is 2 acres or more and generates \$3,333 per acre, the parcel would receive the exemption. If only \$2,000 were generated, then the exemption of Section 3 would not apply since the per-acre revenue is \$667 which is less than \$1,000. [Columns C and D]

Situation 5: Now consider a parcel of 1 acre that produces no revenue and is not in an area zoned for agriculture. As in situation 4 above, however, the by-law provides the Section 3 exemptions to parcels for 2 acres or more that generate \$1,000 or more of revenue. The one-acre parcel meets neither the parcel size requirement nor the revenue requirement and would therefore be ineligible for the exemptions. Even if the parcel generated \$10,000 of revenue, it would not meet the parcel size requirement and again would be ineligible for the exemptions. [Column C]

Situation 6: Finally, the parcel size requirements and the revenue requirements could be lower than those identified in the statute. For example, the five-acre minimum parcel size in situation 2 could be set at 3 acres with no revenue requirement. Such a by-law limit would extend the exemption of Section 3 to the three-acre parcel. Similarly, the by-law limits in Situation 4 could establish a one-acre minimum parcel size and \$500 per acre revenue requirement. This would extend the exemptions to the one-acre parcel that generates \$10,000 in revenue.

## Chapter 240 of the Acts of 2010

**SECTION 79.** Section 3 of chapter 40A of the General Laws is hereby amended by inserting after the word “more”, in line 25, as so appearing, the following words: or to parcels 2 acres or more if the sale of products produced from the agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture use on the parcel annually generates at least \$1,000 per acre based on gross sales dollars.

### **Amended Section 3 of Chapter 40A (inserting text in bold):**

No zoning ordinance or by-law shall regulate or restrict the use of materials, or methods of construction of structures regulated by the state building code, nor shall any such ordinance or by-law prohibit, unreasonably regulate, or require a special permit for the use of land for the primary purpose of commercial agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture, nor prohibit, unreasonably regulate or require a special permit for the use, expansion, reconstruction or construction of structures thereon for the primary purpose of commercial agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture, including those facilities for the sale of produce, wine and dairy products, provided that either during the months of June, July, August and September of each year or during the harvest season of the primary crop raised on land of the owner or lessee, 25 per cent of such products for sale, based on either gross sales dollars or volume, have been produced by the owner or lessee of the land on which the facility is located, or at least 25 per cent of such products for sale, based on either gross annual sales or annual volume, have been produced by the owner or lessee of the land on which the facility is located and at least an additional 50 per cent of such products for sale, based upon either gross annual sales or annual volume, have been produced in Massachusetts on land other than that on which the facility is located, used for the primary purpose of commercial agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture, whether by the owner or lessee of the land on which the facility is located or by another, except that all such activities may be limited to parcels of 5 acres or more **or to parcels 2 acres or more if the sale of products produced from the agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture use on the parcel annually generates at least \$1,000 per acre based on gross sales dollars** in area not zoned for agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture. For such purposes, land divided by a public or private way or a waterway shall be construed as 1 parcel. No zoning ordinance or by-law shall exempt land or structures from flood plain or wetlands regulations established pursuant to the General Laws. For the purposes of this section, the term "agriculture" shall be as defined in section 1A of chapter 128, and the term horticulture shall include the growing and keeping of nursery stock and the sale thereof. Said nursery stock shall be considered to be produced by the owner or lessee of the land if it is nourished, maintained and managed while on the premises. (Emphasis added.)